

BEFORE THE TAX COMMISSION OF THE STATE OF IDAHO

In the Matter of the Protest of)
) DOCKET NO. 22149
[Redacted])
)
) Petitioners.) DECISION
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[Redacted] (petitioners) protest the Notice of Deficiency Determination issued by the auditor for the Idaho State Tax Commission (Commission) dated November 5, 2009. The Notice of Deficiency Determination asserted additional Idaho income tax and interest in the total amounts of \$948.08 and 911.87 for 2006 and 2007, respectively.

The petitioners were residents of Idaho at all times relevant to this matter. [Redacted] is a party to this proceeding solely by virtue of having filed joint income tax returns with his wife, [Redacted]; consequently, [Redacted] will hereinafter be referred to as petitioner. The petitioner received retirement income from [Redacted]. This retirement income was due to her employment by the Idaho Department of Employment. She claimed a deduction regarding this income pursuant to Idaho Code § 63-3022A which stated, in part:

- Deduction of certain retirement benefits. -- (a) An amount specified by subsection (b) of this section of the following retirement benefits may be deducted by an individual from taxable income if such individual has either attained age sixty-five (65) years, or has attained age sixty-two (62) years and is classified as disabled:
 - (1) Retirement annuities paid by the United States of America to a retired civil service employee or the unremarried widow of a retired civil service employee.

The petitioners contend that the retirement income from [Redacted] should be considered to have been paid by the United States of America and that the petitioner should be considered to have been a civil service employee. They contend that since the bulk of the operating budget of the Idaho Department of Employment was received from the federal government that:

1. Her employment with the Idaho Department of Employment should be considered to have been civil service employment, and

2. Her retirement income from [Redacted] should be construed to have been paid by the United States of America.

The issue of whether an employee was a civil service employee has been previously litigated in a case that may be instructive. The Circuit Court of Appeals for the Federal Circuit stated, in part:

The legal issue on appeal is whether an employee of a CIA proprietary is “appointed in the civil service” and, therefore, entitled to civil service retirement benefits solely on the basis of the CIA's ownership of the corporation. As is explained below, Section III, the requirement that the “employee” be “appointed” excludes one whose services are retained merely by contract.

The value of Watts' work is not denied or questioned, but Congress clearly did not intend to award retirement benefits to all persons who might be thought to deserve them. It can, itself, add to the entitlements it has created when it deems it right to do so. The importance of this case is its extraordinary implications for the civil service. The position urged by Watts would create a new category of employees who, without formal appointment or even awareness of the government's role when employed, would become “appointed” civil servants, in numbers unknown, and without thought as to their effect on actuarial soundness of the retirement fund. The implications of Watts' position might extend further to cover employees of corporations, privately owned, yet primarily producing goods or services for the government. We conclude that, in the absence of formal or even intended appointment, Watts is not an “employee” for the purposes of the civil service system.

The provisions of 5 U.S.C. § 8332 establish that service as an “employee” is creditable for civil service purposes. The term “employee” by cross reference is defined in 5 U.S.C. § 2105(a) as follows:

(a) For the purpose of this title, “employee”, except as otherwise provided by this section or when specifically modified, means an officer and an individual who is-

(1) appointed in the civil service by one of the following acting in an official capacity-

* * *

(2) engaged in the performance of a Federal function under authority of law or an Executive act; and

(3) subject to the supervision of an individual named by paragraph (1) of this subsection while engaged in the performance of the duties of his position.

5 U.S.C. § 2105(a).

In Acosta, 803 F.2d at 687, this court concluded that an individual must satisfy all three elements of section 2105(a) to be considered a federal employee and that the requirements for these elements are strictly construed. Acosta, 803 F.2d at 691-92.

The question of the nature of “appointment” was at the heart of the case in Acosta as it is here. The board had held that the contract executed between the Navy and the employees was sufficient to establish “appointment.” Judge Archer writing for the court rejected this argument and noted that:

The established rule is that one is not entitled to the benefit of a [government] position until he has been duly appointed to it. * * * The precedents binding on this court have required that there be a significant degree of formality in the appointment process.

Acosta, 803 F.2d at 692.

These principles were derived in part from Baker v. United States, 614 F.2d 263, 268 (Ct.Cl.1980) (concluding that “an individual cannot hold a government position * * * nor receive the salary and other benefits pertaining thereto, until he or she has been appointed to that position by a person authorized to make that appointment”) and Costner v. United States, 665 F.2d 1016, 1020, 229 Ct.Cl. 87 (1981) (“[a]n abundance of federal function and supervision will not make up for lack of an appointment”).

In concluding that the respondent employees were not “appointed” in the civil service, Judge Archer examined the indicia of appointment such as whether the employees were paid through the civil service system, given an oath of office, or asked to sign an SF 50 or 52. Acosta, 803 F.2d at 694. As noted in a footnote, another indication of civil service status was that one was not subject to Social Security withholding. The court concluded, in the absence of these indicia or a clear and unequivocal document of appointment, that there was no appointment to the civil service within the meaning of 5 U.S.C. § 2105(a). *Id.*

Although the parties in Acosta stipulated that each of the respondents was engaged in the performance of a federal function and was supervised by a federal official, thereby eliminating two of the section 2105(a) tests from the court's

scrutiny, we read Acosta to mean that the question of appointment, by itself, controls the question of whether an individual is an “employee”¹⁵⁸⁰ for the purpose of civil service retirement. Accord Baker, 614 F.2d at 266.

II

We now address, in light of the opinion in Acosta, the question of whether Watts was “appointed” to the civil service by virtue of his employment with a CIA proprietary. As a preliminary matter, we note that Watts' argument that different standards apply to pre-title 5 claims for retirement was directly rejected in Costner. In that case, the court found that:

Section 2105(a) was first enacted in 1966 in the wholesale revision of title 5. * * * The legislative history is quite clear, however, that its provisions represented existing law and made no changes in the substantive requirements imposed on the plaintiff [to establish that he is an “employee”]. * * * The commission [Civil Service Commission] has used precisely these same criteria since 1944. (citations omitted)

Costner, 665 F.2d at 1019 n. 14.

[1] In regard to the issue of appointment, Watts, citing the holding in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803), argues that formalities of appointment are only evidence of appointment and do not control whether there actually was an appointment. In effect, Watts argues that the circumstances as a whole indicate the intention to appoint Watts to the civil service. The court in Acosta distinguished Marbury and rejected precisely this argument, noting that Marbury involved a failure to deliver a commission, not a requirement of appointment. Acosta, 803 F.2d at 693. The formalities of the appointment were observed in Marbury. Id. In Costner the former Court of Claims also rejected the “totality of the circumstances” test suggested by Watts for determining whether there is “appointment.” Costner, 665 F.2d at 1020.

Watts v. Office of Personnel Management, 814 F.2d 1576, 1579-1580 (Fed. Cir. 1987).

As the record stands, the Commission finds that the petitioners have failed to present a compelling argument that [Redacted] was a civil service employee. The record seems clear that she was an employee of the Idaho Department of Employment. Accordingly, it appears she was not duly “appointed” as required by the federal statute. The Commission finds that the petitioners are not entitled to the relief they seek.

WHEREFORE, the Notice of Deficiency Determination dated November 5, 2009, is hereby APPROVED, AFFIRMED, AND MADE FINAL.

IT IS ORDERED and THIS DOES ORDER that the petitioners pay the following tax and interest (computed to March 15, 2010):

<u>YEAR</u>	<u>TAX</u>	<u>INTEREST</u>	<u>TOTAL</u>
2006	\$816	\$147	\$ 963
2007	835	92	<u>927</u>
		TOTAL DUE	<u>\$1,890</u>

DEMAND for immediate payment of the foregoing amount is hereby made and given.

An explanation of the petitioners' right to appeal this decision is enclosed.

DATED this _____ day of _____ 2009.

IDAHO STATE TAX COMMISSION

COMMISSIONER

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of _____ 2009, a copy of the within and foregoing DECISION was served by sending the same by United States mail, postage prepaid, in an envelope addressed to:

[Redacted]

Receipt No.
